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OCT 4 1996
FCC



October 3, 1996

Mr. William F. Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: CC Docket Nos. 96-98/95-185, FCC Order 96-325:
Errata--PG&E's Petition for Reconsideration and Clarification

Dear Mr. Caton:

Enclosed as a resubmission for filing is an original plus fifteen (15) copies of Pacific Gas and Electric Company's Petition for Reconsideration and Clarification. There is a one word omission on page 2 of the pleading PG&E originally submitted for filing dated September 27. The error on page 2, second line from the top states "...4 electric accounts and 3 million gas accounts." The word "*million*" was omitted and the correction should read as "...4 *million* electric accounts and 3 million gas accounts...." Copies will be served on all parties who were served the September 27 petition.

Please file-stamp/date-stamp a copy and return to us in the enclosed, self-addressed envelope.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Shirley Woo".

SHIRLEY A. WOO

SAW:cmp

cc: Interested parties in CC 96-98/CC95-185

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OCT 4 1996

In the Matter of)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions in the Telecommunications Act)	
of 1996)	
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Interconnection between Local Exchange)	CC Docket No. 95-185
Carriers and Commercial Mobile Radio)	
Service Providers)	

ERRATA

PETITION FOR RECONSIDERATION AND CLARIFICATION

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Dated: October 3, 1996

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To: The Commission

ERRATA

PETITION FOR RECONSIDERATION AND CLARIFICATION

Pursuant to Section 1.429 of the Federal Communications Commission's (FCC) Rules, Pacific Gas and Electric Company hereby submits its Petition for Reconsideration and Clarification of the Commission's Order, FCC 96-325, released August 8, 1996, in the above-captioned proceeding to implement the non-discriminatory access provisions of the amended Pole Attachment Statute, 47 U.S.C. 224.¹ Specifically, PG&E requests reconsideration or clarification of certain issues addressed at Section X1.B. (paragraphs 1119-1240) of FCC 96-325 relating to access to utility rights of way by telecommunication providers.

Pacific Gas and Electric Company (PG&E) is a California investor-owned electric and gas utility. PG&E's electric and gas service area covers over 70,000 square miles of central and northern California and includes all or a portion of 48 of California's 58 counties. PG&E's utility operations provide

¹ The order was published in the Federal Register on August 29, 1996, 61 Fed. Reg. 45476.

electric and gas utility service to a population of over 11.5 million people served by over 4 million electric accounts and 3 million gas accounts. PG&E is responsible for operating and maintaining an estimated 19,000 miles of electric transmission facilities and an estimated 100,000 miles of electric distribution facilities. PG&E's utility business is regulated by the California Public Utilities Commission which has oversight authority over all these facilities. PG&E participated in the Rulemaking as a member of the Utility Infrastructure Owners Group which filed Comments and Reply comments on the Notice of Proposed Rulemaking in this docket.

As an electric and gas utility, PG&E will be impacted by the Commission's interpretation and implementation of the Pole Attachment Statute, 47 U.S.C. Section 224, as amended by the Telecommunications Act of 1996, including the Commission's interpretation of the states' regulatory authority over rates, terms, and conditions under 47 U.S.C. Section 224(c).

FCC 96-325 requires all utilities to provide access to their poles, ducts, conduits and rights-of-way to telecommunication carriers and cable television systems if the utility has allowed any telecommunication equipment, even its own for its own internal use solely, into any of the utility's facilities. This requirement raises serious constitutional questions, including the taking of property without just compensation. The Commission did not address the issue of compensation in FCC 96-325, but has deferred that issue to a subsequent rulemaking. Therefore, although PG&E has petitioned the Commission, it does not concede that the Commission has correctly interpreted the Act on

questions of access or compensation, nor does PG&E concede that the Act's access provision, or the regulations promulgated thereunder, are constitutional.

I. FEDERAL JURISDICTION AND RULES VERSUS STATE JURISDICTION AND RULES

A. States may pre-empt Commission jurisdiction over pole and conduit rates, terms and conditions for attachments by telecommunication and cable television entities

The order interprets and incorporates into the FCC's Rules provisions addressing the issue of nondiscriminatory access to utility poles, ducts, conduits and rights-of-way ("pole attachments") contained in Section 224 of the Communications Act of 1934, as amended by Section 703 of the Telecommunications Act of 1996. Although the main focus of the Notice of Proposed Rulemaking was on telecommunications carriers, the policies adopted regarding the pole attachment access provisions of Section 224 will have a direct and significant impact on energy utility rights of ownership and management of their poles, ducts, conduits and right-of-way.

Investor owned electric and gas utilities are subject to regulation by state utilities commissions. In California, the Public Utilities Commission has extensive authority to regulate California utilities' operations, including such matters as overhead and underground construction, maintenance practices, encumbrance of property, cost allocation and charges. These regulatory powers extend to both tangible property, such as poles, and intangible assets used in the utility's provision of utility service.

On issues such as safety and reliability, the Commission's order adopts rules and guidelines recognizing the need to accommodate different requirements arising from state and local regulation. The order leaves state and local requirements in place, "even where a state has not asserted preemptive authority in accordance with Section 224(c) . . . unless a complainant can show a direct conflict with federal policy" (Order, paragraph 1154). Paragraph 1154 goes on to state "Where a local requirement directly conflicts with a rule or guideline we adopt herein, our rules will prevail". This latter statement is made in a context which can fairly be read to limit its applicability to those situations where a state has not asserted preemptive authority in accordance with Section 224(c). However, the order does not provide a clear, unequivocal statement to that effect. PG&E therefore requests clarification of this aspect of the order.

B. The FCC rules for pole and conduit attachment should be clarified to be inapplicable where the state has asserted preemptive authority in accordance with Section 224(c).

Section 703 of the 1996 Act left intact the ability of a state to pre-empt federal regulation of rates, terms, and conditions for pole attachments while extending the opportunity for state preemption to include rates, terms and conditions for access thereto. Section 224(c)(2) and (3) set forth requirements the state must satisfy to be considered to regulate the rates, terms and conditions for pole attachments. Where a state does satisfy the requirements, the statute provides "Nothing in this section shall be construed to apply to, or to give the Commission

jurisdiction with respect to rates, terms, and conditions or access to poles, ducts, conduits, and rights of way for pole attachments. . . ." In essence, once a state has met the certification requirements, the Commission no longer has jurisdiction under Section 224 over pole attachments. For this reason, even if the FCC pole access and attachment rules adopted in FCC 96-325 are in direct conflict with a state's requirement, the FCC rule would not prevail if the state has met the requirements of Section 224(c)(2) and (3) and has so certified to the Commission.

Nothing in the background or legislative history of Section 224 of the Communications Act, or Section 703 of the Telecommunications Act of 1996, suggests a different result. Section 253 does invalidate state requirements that prohibit or have the effect of prohibiting an entity from providing any interstate or intrastate telecommunications service, but it does not vest the Commission with the jurisdiction either to establish the benchmarks for that determination or to preempt the state requirements prior to a court decision on the regulation in controversy, even if the state requirement is in direct conflict with FCC rules. Therefore, the Commission should clarify its order to defer to the states whenever a state has asserted preemptive authority, regardless of whether any conflict exists between the state and Commission rules.

II. ELECTRIC UTILITIES' ABILITY TO RESERVE CAPACITY FOR FUTURE CORE ELECTRIC SERVICE IS REQUIRED TO MEET THE BASIC AND UNIVERSAL PUBLIC NEED AND INTEREST IN CORE ELECTRIC SERVICE.

The order recognizes that the near universal public demand for electrical service does entitle electric utilities to

a greater ability to reserve capacity on their facilities to meet future demand for electrical service, while imposing corresponding obligations to provide service. At the same time, the order cites a policy objective of not allowing space to go unused when a telecommunications or cable company could utilize it. The order handles these differing concerns by only allowing an electric utility to reserve space pursuant to a plan that "reasonably and specifically" projects a need for the space for electric utility service. Until that need materializes, the order would require the electric utility to use the identified space to accommodate CATV and telecommunication attachments. If a need materializes which is not covered by the requisite plan, the electric utility apparently would not be able to retrieve the capacity which its investment created for electric utility use. PG&E is concerned about this possible interpretation of FCC 96-325 and requests the Commission clarify and modify its order to recognize the realities of electric distribution utility facility planning by allowing electric utilities greater capacity call-back authority.

A. The Commission's rules should not require plans for electric utility capacity reservation to identify specific facilities.

FCC 96-325 does indicate that disputes over capacity reservations by utilities will be resolved on a case-by case approach, taking into consideration the reasonableness of the utility's forecast and any additional, relevant information. However, the order also discusses the issue of planning for reserve capacity as if it were simply a matter of measuring space on a specific pole or within a particular conduit. That approach

is quite incorrect for electric utility distribution planning. Moreover, for an energy utility of PG&E's extensive geographic size with tens of thousands of miles of facilities, facility-specific distribution planning is both highly unrealistic and unreasonable to expect.

Analysis of the need for capacity on an electric distribution system very often needs to be done on an area basis. For instance, the planning area would be the area served by substations which are interconnected at the distribution voltage level. Together, the substations and all the electric distribution lines, both overhead and underground, serve and support the area, which can span several cities in PG&E's case. The utility would have projections of its need for additional capacity within the area, but may not know which specific poles or conduits would be needed for the distribution system upgrade or addition. Our planning simply tells us we can expect to need additional electric distribution capacity of a given amount within the planning horizon for the area involved.

FCC 96-325 should be clarified to recognize that bona fide electric utility plans often will look at an area as a whole and will not get into the detail of identifying the specific distribution poles or conduits to utilize for future electric system upgrades. That type of detail may not be determined until the forecast need has materialized and the upgrade is undergoing engineering for installation. To deny the electric utilities the right to reserve capacity unless they plan at that level of detail amounts to denying electric utilities the ability to reserve any capacity for future core electric needs.

- B. The Commission's rules should encourage the joint development of jointly used facilities between telecommunication providers and electric utilities by allowing electric utilities to call back capacity originally installed for electric service.

In addition, if the Commission's rules require an unrealistic level of detail, the order's limitation on the electric utilities' right to call back capacity when needed for electric service will prove a disincentive for telecommunications and cable providers to work up-front with electric utilities in the development and cost sharing to develop jointly used facilities. Instead, the order would give the telecommunication and cable providers the ability to occupy capacity created by the electric utility and deny the electric utility the ability to later use that capacity to serve electric consumers. With this alternative at hand, there would be little incentive for the telecommunication and cable providers to participate in and bear their proportionate share of costs to install jointly used facilities.

In PG&E's northern and central California service area, there has been extensive sharing of joint installation or ownership for distribution. When facilities are going underground, telecommunication, cable and electric utility providers routinely coordinate to share costs of a joint trench in which each owner places its own conduit at its own expense. The cost of the jointly created trench is shared among the occupants proportionally according to their need for space in the trench, with each bearing the cost of its own conduit. The overall result from the cooperative effort is the public benefit of reduced disturbance from street cuts and a lower cost to all

trench occupants. However if a cable or telecommunication provider can get access to electric utility conduit and the capacity is not subject to recall when needed by the electric utility, there would be a disincentive to participate in joint trench development or to plan for future use. Moreover, this result would not be economically efficient. Instead of encouraging the creation of telecommunication conduit capacity which is closer to the surface and normally less costly than installation of electric conduit, this scenario would cause installation of additional electric conduit when the existing electric conduit is needed later for core electric service but is unavailable due to telecommunication or cable entities' occupation of the space.

These reasons and the very basic nature of electric utility service for everyone merit a rebalancing of the right of electric utilities to call back capacity they paid to create versus the ability of telecommunications and cable entities to occupy capacity and prevent its later use for electric service purposes. PG&E maintains that electric utilities should be accorded the right and ability to call back capacity they invested in when it is needed for electric utility service. Under this approach, the electric utility's need for the capacity to serve electric customers will be clearly identified and present when the recall occurs. Moreover, all entities using support structures in the rights of way will have a reasonable incentive to participate in the creation of joint facilities. In the event the electric utility does need to call back capacity for its own use, new capacity for the telecommunication or cable

provider would be created at their expense after that entity decides between the alternatives then available.

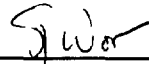
III. CONCLUSION

WHEREFORE, PG&E respectfully requests the Commission to confirm that its rules will prevail in the event of direct conflict with a state regulation only in those situations where the state has not asserted preemptive authority in accordance with Section 224(c). If a state has satisfied the requirements of Section 224(c)(2) and (3), PG&E requests that the Commission clarify that the state regulation will prevail even if there is a direct conflict with FCC rules. Additionally PG&E respectfully requests the Commission to clarify that a bona fide plan for utility capacity reservation need not identify specific distribution structures beyond the detail in the electric utility's normal distribution planning process. Finally, PG&E requests the Commission modify its order to allow electric utilities to call back capacity which they originally installed for electric utility service purposes.

Respectfully submitted,

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Dated: October 3, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by mailing copies thereof first class, postage paid to each person designated on the official service list maintained by the Office of the Secretary and those interested parties in proceeding CC96-98/CC95-185.

Executed this 3rd day of October, 1996, in San Francisco, California.


CHRISTINE M. PURDY